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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 359

WILLIAM H. HIATT, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

EUGENE PRESTON BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

I. THE GOVERNMENT HAS BORNE ITS BURDEN OF SHOWING COMPLIANCE WITH AW 8

In his brief (pp. 15–29), the respondent relies heavily on the proposition, put succinctly by the court below (R. 68), that "There is no presumption in favor of the validity of a judgment or sentence of a court martial, and the burden of proving that it was legally organized, that it had jurisdiction, and that all statutory requirements governing its proceedings were complied with, rests upon the party seeking to uphold its judg-

ments." [1] The respondent insists that the Government, relying on a presumption of validity, has not met this burden.

The Government accepts the statement of the court below, quoted above, as an accurate restatement of the language of this Court in some of the earlier cases which are cited to support it, while noting that the language takes no account of the general presumption of the regularity of official action.[1] The Government denies, however, that it has failed to carry the burden of showing compliance with AW 8.

The difference between respondent and the Government is not, in this respect, a factual one; it is, rather, a difference as to what are the requirements of AW 8 compliance with which must be shown. As we have sought to demonstrate in our principal brief, AW 8 does not require the Government to show, in a habeas corpus proceeding, that a JAG officer was not available for the purpose of serving as law member. That question, under AW 8, is left to the appointing authority for decision. "The commanding officer who convenes the court must decide what membership will be least to the 'injury of the service' and what officers are 'available'." *Henry* v.

[1] "It is the settled general rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, and that where the contrary is asserted it must be affirmatively shown." *Lewis* v. *United States*, 279 U. S. 63, 73, and cases cited. Compare *Wade* v. *Hunter*, 336 U. S. 684, 692.

Hodges, 171 F. 2d 401, 403 (C. A. 2), certiorari denied, 336 U. S. 968. His decision, like that involved in *Martin* v. *Mott*, 12 Wheat. 19, 35, "being in a matter submitted to his sound discretion, must be conclusive."

This is not a case like *Runkle* v. *United States*, 122 U. S. 543, in which the statute (AW 65) required confirmation of the court martial proceedings by the President and it was not shown that the President had, in fact, approved or confirmed. Here, the record plainly shows that the court was detailed "by command of Brigadier General Bresnahan", the appointing authority (R. Vol. II, 53–54). Nor is this a case like *McClaughry* v. *Deming*, 186 U. S. 49, 63–64, in which the court was made up "of members each and all of whom were prohibited by law from sitting on such court." The essential difference between the case at bar and those cited is that the Articles involved in those cases imposed absolute requirements and left no room for an exercise of judgment; the Article here involved, however, plainly commits to the appointing authority a discretionary, "on the spot", power to strike "a balance between the conflicting demands upon the service". *Henry* v. *Hodges*, 171 F. 2d 401, 403 (C. A. 2), certiorari denied, 336 U. S. 968.[2] In such a

[2] The new AW 8 (see principal brief, pp. 24–25, note 8) takes from the appointing authority this discretionary authority and substitutes an absolute requirement that the law member be a JAG officer or "an officer who is a member of

case, "the courts must assume—nothing to the contrary appearing upon the face of the order convening the court—that the discretion conferred upon [the appointing authority] was properly exercised." *Mullan* v. *United States*, 140 U. S. 240, 245.

II. The Concurrence of Two-Thirds of the Members of the Court-Martial Present Was Sufficient for Respondent's Conviction

At pages 48–50 of his main brief in this Court, respondent renews a contention made in both of the lower courts (see R. 7, 14, 59), which, if sound, would indicate that the court martial may have exceeded its statutory powers in finding him guilty of murder under AW 92 (10 U. S. C. 1564), but which was not relied on by either of those courts in their determination that his conviction is invalid. The district court expressly held the contention to be without merit (R. 51, 54) and the Court of Appeals found it "unnecessary to pass upon" it (R. 71). Since, if the contention were sound, it would constitute a basis for supporting the lower courts' judgments, though different from any relied upon by those courts, it is available to respondent in this Court, though he filed no cross-petition for cer-

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the bar of a Federal court or of the highest court of a State of the United States and certified by the Judge Advocate General to be qualified for such detail".

tiorari.[3] We submit, however, that there is no merit in the contention.

Respondent's arguments is that under AW 43 (10 U. S. C. 1514) three-fourths of the members of the court martial are required to concur in a finding of guilty of murder for such a finding to be valid, and that here the court martial record indicates that "two-thirds of the members" concurred in this finding (R. Vol. II, 96). It is not disputed, however, that *three-fourths* of the members of the court concurred in the *sentencing* of respondent to life imprisonment (see R. Vol. II, 97), the mandatory minimum punishment for murder prescribed by AW 92 (10 U. S. C. 1564).[4] The insubstantiality of respondent's contention appears, we think, from the plain terms of AW 43. It provided, at all times relevant hereto, as follows:[5]

> No person shall, by general court martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court martial present at the time the

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[3] See *Nye & Nissen* v. *United States*, 336 U. S. 613, 616, 618–620; *Walling* v. *General Industries Co.*, 330 U. S. 545, 547; *United States* v. *Ballard*, 322 U. S. 78, 88; *Le Tulle* v. *Scofield*, 308 U. S. 415, 421–422; *Commission* v. *Havemeyer*, 296 U. S. 506, 509; *Langnes* v. *Green*, 282 U. S. 531, 535–539.

[4] AW 92 provides: "Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court martial may direct; * * *."

[5] AW 43 has been since amended in a significant respect, clarifying in nature, which gives added support to our position. See *infra*.

> vote is taken, and for an offense in these articles expressly made punishable by death; *nor sentenced to life imprisonment,* nor to confinement for more than ten years, *except by the concurrence of three-fourths of all the members present at the time the vote is taken. All other convictions* and sentences, whether by general or special court martial, *may be determined by a two-thirds vote of those members present at the time the vote is taken.* All other questions shall be determined by a majority vote. [Italics supplied.]

Respondent argues that, though the above article "is peculiarly drawn," "[t]he true intention of Congress * * * is to require a three-fourths vote [for conviction] in any case where sentence of life imprisonment is a mandatory minimum" (Br. 50). But this argument perverts the plain terms of the article. The pattern it establishes with reference to the minimum permissible percentage participation by court martial members in court action relating to convicting and sentencing is clear. In order for the court to *convict* a person of an offense for which the death penalty is made mandatory by law,[6] *or* to *sentence* a person to death for an offense for which death is a permissible though not mandatory penalty,[7]

[6] Spying in time of war is the only such offense. AW 82 (10 U. S. C. 1554.)

[7] *E. G.* (in addition to murder and rape (AW 92)), desertion in time of war (AW 58, 10 U. S. C. 1530), mutiny or sedition (AW 66, 10 U. S. C. 1538), misbehavior before the enemy

the decision must be unanimous. For the court to *sentence* a person to life imprisonment or to imprisonment for more than ten years, the decision must be concurred in by at least three-fourths of the court. But *all other convictions and sentences* may be determined by a two-thirds vote of the members of the court; that is to say, to *convict* of any offense other than the single type of offense previously specified (to wit, where death is the mandatory penalty imposed by law), or to *sentence* to ten years' imprisonment or less, a two-thirds vote suffices.

If the above interpretation of AW 43 as it read at the time of respondent's trial, conviction, and sentence was ever doubtful, the doubt has been eliminated by the amendment of that Article by § 220 of the Act of June 24, 1948, c. 625, 62 Stat. 633.[4] This section amended AW 43 as it formerly read (and as set out *supra*) by substituting for the words "All other convictions and sentences" in the second sentence thereof, the words—

> Conviction of any offense for which the death sentence is not mandatory and any

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(AW 75, 10 U. S. C. 1547), etc. It is only in the cases of murder and rape that the sole alternative sentence to the death penalty is life imprisonment. In all other cases where death is a permissible penalty, the offender may be sentenced to "death or such other punishment as a court martial may direct."

[4] Effective as of February 1, 1949. See § 244 of the Act referred to, 62 Stat. 642.

> sentence to confinement not in excess of ten years * * *.

The substituted words thus embody explicitly what was formerly implicitly contained within the concept "All other convictions and sentences." The legislative history of the amendment, moreover, makes it entirely clear that the change was designed merely to clarify the meaning of the Article as it formerly stood.*

Clearly, therefore, since respondent's offense, murder, does not carry the mandatory penalty of death, no more than two-thirds of the court were required to concur in the finding of guilty, though three-fourths were required to (and did) concur in the sentence to life imprisonment, just as all the members would have been required to

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*See H. Rep. 1034, pp. 12, 18, 80th Cong., 1st sess., accompanying H. R. 2575 (the bill H. R. 2575 was never enacted, but its substance was incorporated as title II of S. 2655, 80th Cong., 2d sess., which became the Act of June 24, 1948, *supra*: See H. Rep. 2438 [Conference Report], p. 51, 80th Cong., 2d sess., accompanying S. 2655); see also the statement of Brigadier General Hoover, Assistant Judge Advocate General, as to the purpose of the proposed amendment of AW 43, in his appearance before the House Committee on Armed Services, Subcommittee No. 11, Legal (No. 125, *Subcommittee Hearings on H. R. 2575, to Amend the Articles of War, &c., April 14*, 1947, pp. 2055–2056). "The changes that are now proposed in the article [AW 43]," said General Hoover (p. 2056), "are intended to clarify the wording of the article, *but not to change the sense of it.* The result will be that we will be able to *convict a man of murder by a two-thirds vote*, but if we want to sentence him to death there must be a unanimous vote" [italics supplied].

concur in a sentence of death. See *Anderson* v. *Hunter*, 177 F. 2d 770, 771 (C. A. 10).

It might be supposed, it is true—and this appears to be the consideration which gives rise to respondent's present contention—that it is somewhat inconsistent for Congress, on the one hand, to require only two-thirds of the members of the court martial to concur in a *conviction* of an offense for which the *mandatory minimum* penalty is life imprisonment, and yet, on the other hand, to require three-fourths of the court to concur in the imposition of that mandatory minimum sentence.[10] But we think the inconsistency is only apparent, and not real. The true meaning of AW 43 is this: A conviction of murder may be had by a two-thirds vote. The mandatory minimum penalty imposable for this offense is life imprisonment (AW 92), but nevertheless, under AW 43, at least three-fourths of the membership of the court martial must concur in the decision to impose this sentence in order for it to be valid.[11]

[10] Cf *Stout* v. *Hancock*, 146 F. 2d 741, 744 (C. A. 4), certiorari denied, 325 U. S. 850, where the court, though the issue there involved was different from that at bar (the issue there being whether the words "and for an offense in these articles expressly made punishable by death," in the first sentence of AW 43, required that a sentence to life imprisonment for rape be *unanimously* concurred in by the members of the court martial), adverted to the "apparent inconsistency" in AW 43 to which we are now referring.

[11] It is to be noted that "Voting [as to the sentence to be imposed] * * * is obligatory on each member regardless of his vote as to the findings. It is the duty of each mem-

If a three-fourths vote cannot be attained, there is only one alternative open to the court—to revoke its finding of guilty of murder and find the accused either not guilty or guilty of a lesser included offense.

This is the administrative interpretation of AW 43. The *Manual for Courts-Martial*, 1949 ed., par. 80*b*, provides in pertinent part:

> * * * The concurrence of all members present at the time a vote is taken is required to adjudge the death penalty; three-fourths of the members present at the time the vote is taken must concur to adjudge a sentence to life imprisonment and to confinement for more than 10 years, and the concurrence of two-thirds of the members present at the time the vote is taken is required to adjudge any other sentence (A. W. 43). * * * *Any sentence, even in a case where the punishment is mandatory, must have the concurrence of the required number of members. If a general court martial, after finding an accused guilty of an offense for which a mandatory punishment is prescribed by the Articles of War, shall find upon a ballot being taken upon the question of imposition of such mandatory sentence that the number of votes required by Article 43 for*

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ber to vote for a proper sentence for the offense or offenses of which the accused has been found guilty, without regard to his opinion or vote as to the guilt or innocence of the accused. * * *" (MCM, 1928 ed., par. 80*b*; *id.*, 1949 ed.)

> *the imposition of such sentence have not been cast in its favor, then a second ballot shall be taken upon the same question. If upon such second ballot the requisite number of votes for the imposition of such sentence is still lacking, the court will reconsider its findings in the case and may revoke its former findings and find the accused not guilty, or guilty of a lesser included offense.* [Italics supplied.]

This sensible construction of AW 43 and AW 92, read in conjunction with each other as they must be, by the executive department charged with their administration, is entitled, under repeated decisions of this Court, to great weight in their construction by the courts. It fully resolves, in a manner entirely fair to the accused, the latent ambiguity in the two Articles. It is, moreover, in harmony with the decision of this Court in *Andres* v. *United States*, 333 U. S. 740, 746–749, involving a comparable ambiguity in the federal statutes relating to the power of a jury to return a qualified verdict of guilty of first-degree murder.

III. This Court Should Find Compliance With AW 8 In This Case Even Though the Judgment of the Court Below May Be Reversible On Other Grounds

Several very recent decisions of the lower federal courts announce a rule which would permit of the temporary disposition of this case on the

ground that respondent's application for a writ of habeas corpus is premature in that he has failed to exhaust his administrative remedies."

In these cases, the courts have held that Article 53 of the amended Articles of War (Act of June 24, 1948, c. 625, Sec. 230, 62 Stat. 639, effective February 1, 1949) which authorizes the Judge Advocate General, upon good cause shown, to grant a new trial or other relief to a person convicted by court martial, affords an administrative remedy which, except possibly in extraordinary cases, must be exhausted before habeas corpus will lie. See also *Manual for Courts-Martial, U. S. Army*, 1949, c. XXII. This rule has been applied even when, as here, the original court martial judgment had been approved by the Judge Advocate General on the original review (R. Vol. II, 6–7). And the rule has been invoked to dispose of more than 35 of the approximately 60 cases similar to that at bar, to which reference was made in the petition for a writ of certiorari in this case, p. 12.

Despite the possible availability of this ground for reversal of the judgment below, the Government urges this Court to correct what we believe

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[11] See, *e. g.*, *Whelchel* v. *McDonald*, 176 F. 2d 260, 262–263 (C. A. 5); *Spencer* v. *Hunter*, 177 F. 2d 370 (C. A. 10); *McMahan* v. *Hunter*, C. A. 10, No. 3975, November Term, 1949; *Massey* v. *Humphrey*, 85 F. Supp. 534 (M. D. Pa.); *Sinclair* v. *Hiatt*, 86 F. Supp. 828 (N. D. Ga.).

to have been the substantive errors committed by the court below. There is no reason to anticipate that, on applications filed with him under AW 53, the Judge Advocate General would reverse the course of military decisions as to the meaning of AW 8 referred to in our principal brief (pp. 27–31), and reject the views of the Court of Appeals for the Second Circuit as announced in *Henry* v. *Hodges*, 171 F. 2d 401, certiorari denied, 336 U. S. 968. Consequently, dismissal of respondent's petition on grounds of prematurity would be most likely to accomplish no more than a postponement of this and the many other cases involving AW 8, rather than a genuine disposition of them.

When, as here, there is an existing conflict among the circuits on the question, the Government is of the view that this Court should resolve that conflict even though the question on which it arises might temporarily be avoided. Even in a case involving an important constitutional question, this Court, through Mr. Justice Holmes, has said, "The general question to which we have adverted must be decided, if not in this then in the next case, and it should be disposed of now." *Block* v. *Hirsh*, 256 U. S. 135, 156–157; see also *Penna. Coal Co.* v. *Mahon*, 260 U. S. 393, 414.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

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